IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA

FIRST APPEAL NO. 42 OF 2002

Shri Umesh Bondre,
aged about 36 years, residing at
House No. 2/155B, Bondre Building,
next to Old Cinema Theatre,
Naikawaddo, Calangute, Bardez, Goa. .... Appellant
(Original Defendant)

Versus

Mr. Wilfred Fernandes,
aged 38 years, son of Hilario
Manuel Fernandes, residing at
House No. 697, Palms Corner,
Pintos Vaddo, Candolim, Bardez, Goa. .... Respondent
(Original Plaintiff)

Shri Shivan Dessai, Advocate for the Appellant.
Shri D. Pangam, Advocate for the Respondent.

CORAM : **P.V. KAKADE, J**.

DATE : **19th September, 2006**

ORAL JUDGMENT

This appeal is preferred by the unsuccessful defendant against the Judgment and order passed by the Ist Additional Civil Judge, Senior Division, Mapusa decreeing the respondent's-plaintiff's suit for mandatory and perpetual injunction against the defendant.

2. Heard the learned Counsel for the parties. Perused the record.

3. Respondent/plaintiff is the proprietor of M/s. Jesuwil Travel and Tours situated in Laxmi Apartments at Candolim and also an agent for different airlines. His wife is maintaining a public communication centre at the said premises. It is the case of the plaintiff that defendant approached one John Daniel alias John Tejpur and he was in search of a premises for restaurant. Therefore, defendant took him to one of his relatives by name Surendra Kandolkar, who owned a property at Candolim beach. Said John had to carry out the construction and the expenses were to be deducted from the lease amount. Said John on condition that he should be entitled to run bar and restaurant for five years agreed and defendant agreed to make arrangements. The agreement between defendant and John Daniel was that premises should be given on lease and the money advanced by him would be adjusted towards the rent due to Surendra Kandolkar. Said John advanced Rs. 5,66,000/- and the premises was constructed. Defendant was paid initially, initial amount of Rs. 7,500/- for the purchase of wood for tables etc. and also paid some amount for various purchases. John Daniel, therefore, started running the bar and restaurant in the name of 'Gourmet Bar and Restaurant' in the month of November, 1995 with the assistance of

Mrs. Elizabeth Daniel and his daughter who had come from Italy and six friends of her were all rendering assistance from the bar and restaurant. Respondent-Plaintiff got acquainted with John Daniel in August, 1995 and had embarked upon a project under the name of Abalone Resorts. In the month of December, 1995, said Daniel expressed his difficulty in running the business as Elizabeth had gone to Kerala and in the January, 1996 John Daniel offered to the plaintiff the suit premises on leave and licence basis or on franchise. Plaintiff informed him that he is not interested in the premises and is willing to buy only the equipments of the bar and restaurant. Therefore, the plaintiff entered into an agreement with said John to purchase the equipments and other movables including the furniture for Rs. 5,00,000/-. Accordingly, under the said agreement plaintiff paid Rs. 50,000/- to John on 26/02/1996 and balance was to be paid in instalments. It is the case of the plaintiff that on this agreement said John gave possession of all the articles as per the list and the keys of the premises to the plaintiff. The premises was made available to John by defendant, owner of the premises Mr. Surendra was in Middle East and the premises was given to John for five years. John had given the keys to the plaintiff to take the articles. However, on 24/05/1996 defendant without any reason put his own locks to the shutters and restrained the plaintiff

from entering the premises, demolished the said cover, the frontage of the suit premises as well as removed one water pump and overhead water tank and also put new locks to the side door and hence this suit for permanent and mandatory injunction came to be filed. The defendant contested the suit, inter alia, denying all the allegations made by the plaintiff with submission that the suit is bad for non-joinder of parties as said Daniel who played pivotal role in the suit transaction was not joined in the suit as a party. It was further contended by the defendant that there was no agreement between John Daniel and defendant in respect of the suit premises. It was also denied by the defendant that premises was given on lease to John Daniel and amount of Rs. 5,66,000/- was advanced by said Daniel. Also according to the defendant the articles inside the restaurant belonged to Kandolkar and his wife and plaintiff had no right to keep the articles and hence the suit was sought to be dismissed with costs.

4. The learned trial Judge recorded the evidence and on the basis of such evidence and pleading of the parties, came to the conclusion that plaintiff has succeeded in establishing the existence of John Daniel which was denied by the defendant. It was further held that plaintiff had proved that the said bar and restaurant was run by said Daniel and that they had

agreed to purchase the goods and, therefore, the plaintiff was entitled to the decree as prayed for and the suit came to be dismissed. Hence the present appeal.

5. On hearing both the sides, it is apparent that entire dispute revolves around the controversy on the point of contract between the plaintiff and said John Daniel who has not entered the picture in this dispute. So far as proceeding is concerned the document of receipt dated 21/02/1996 reads thus:

> "Received the deposit of Rs. 50,000/- from Wilfred Fernandes for all my goods in the Gourmet Restaurant and the remaining Rs. 4,50,000/- to be paid in instalment of Rs. 9,000/- per month"

This document purported to be executed by John Daniel is the bone of contention between the parties. It is alleged that it is bearing signature of said John Daniel. It is the case of the plaintiff that this document amounts to an agreement between the plaintiff and the said John Daniel who sold all his goods in the Gourmet restaurant to the plaintiff for consideration of Rs. 5,00,000/-, out of which he had received Rs. 50,000/- and remaining Rs. 4,50,000/- were to be released by way of monthly instalment of Rs. 9,000/-. Now, apart from any other aspect it must be noted that it is evident that

plaintiff has allegedly paid only Rs. 50,000/- and not paid further instalment under the so called agreement between himself and Daniel, and therefore, even if it is assumed for a moment, without admitting the fact, that document of receipt is genuine, still, in my considered view it does not give any ownership right to the plaintiff over the property worth Rs. 5,00,000/-, only because advance of Rs. 50,000/- is stated to be paid to Daniel and, therefore, the suit based on such documents could not be held to be maintainable for purpose of relief of mandatory and perpetual injunction, especially when plaintiff has failed to show that he is the owner of the property that is sought to be taken in possession of, by virtue of mandatory injunction through the Court.

6. Apart from this aspect, as pointed out by the learned Counsel for the appellant, main question remained to be determined as to the legal status of the agreement between plaintiff and Daniel. It was submitted on behalf of the appellant that the document of receipt, which is professed to be an agreement between the concerned persons is not at all as contemplated under Section 67 of the Evidence Act. It was submitted by Mr. Dessai, that the executor of the documents was not examined and there was no sufficient reason nor there was any explanation as to why Mr. Daniel

was not examined to prove the authenticity and contents of the suit document i.e. the receipt dated 21/02/1996. It was also urged, that no independent witness was examined to prove the signature and the receipt, in order to establish that it was signature of John Daniel and none else. In contra, it was submitted on behalf of the respondent, that there was sufficient oral evidence on record of witnesses to show that attending circumstances brought on record were sufficient to establish not only the factor of agreement between the plaintiff and Daniel but also the fact that there was such agreement between the said parties. In support of this version my attention was invited to the evidence of the witnesses examined on behalf of the plaintiff.

> PW 2 – Daglos D'Souza is in printing business and has stated that he knew John Daniel and had prepared some visiting cards with regard to the bar and restaurant by name Gourmet.
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> PW 3 – Costa Fernandes has stated that he knew John Daniel alias John Tejpar. The said witness is manufacturer of deep freezers and appears to have supplied some deep freezers to the bar and restaurant.
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> PW 4 – Lavu Toraskar is a security service personnel and has stated that he was engaged in the month of May, 1996 by the plaintiff as security person in the premises of bar and restaurant.

Therefore, the critical perusal of the evidence of these witnesses, does not

help the plaintiff to establish the genuineness of the alleged agreement between himself and John Daniel. At the most, the evidence of such witnesses would show the existence of a person by name John Daniel who was having some business activity in the suit premises. However, there is absolutely no independent evidence on record to show that such person by name John Daniel was lessee in the suit premises, nor there is any evidence on record to show that he had any subsisting right to offer the premises on leave and licence to the plaintiff. It is the case, sought to be made out by the plaintiff, that the business was being run by Daniel with his wife Elizabeth, however, there is no evidence to show, what role Elizabeth Daniel played in the entire scenario. It is evident from the record that she was not wife of John Daniel and, therefore, the document executed by her is independent of such alleged relation with John Daniel would be of no consequence and, therefore, the plaintiff cannot rely on any such receipt executed by appellant in favour of said Elizabeth.

7. Mr. Pangam, the learned Counsel for the respondent submitted that even though John Daniel's presence could not be secured in support of his claim, in the course of evidence, still, he himself had testified to the fact that it was the signature of John Daniel and he could be witness to his own

cause. There cannot be two opinions in this regard that a party can be a witness to its own cause . This view is also supported by the ruling relied upon by Mr. Pangam in the case of ***S. Gopal Reddy Versus State of A.P.*** (1996) 4 Supreme Court Cases 596, wherein it is observed that Section 67 of the Evidence Act, 1872 enjoins that before a document can be looked into, it has to be proved. Section 67, of course, does not prescribe any particular mode of proof. Section 47 of the Evidence Act which occurs in the chapter relating to "relevancy of facts" provides that the opinion of a person who is acquainted with the handwriting of a particular person is a relevant fact. Similarly, opinion of a handwriting expert is also a relevant fact for identifying any handwriting. The ordinary method of proving a document is by calling as a witness the person who had executed the document or saw it being executed or signed or is otherwise qualified and competent to express his opinion as to the handwriting. There are some other modes of proof of documents also as by comparison of the handwriting as envisaged under Section 73 of the Evidence Act or through the evidence of a handwriting expert under Section 45 of the Act, besides by the admission of the person against whom the document is intended to be used. The receiver of the document, on establishing his acquaintance with the handwriting of the person and competence to identify the writing with

which he is familiar, may also prove a document. These modes are legitimate methods of proving documents but before they can be accepted they must bear sufficient strength to carry conviction. In other words, unless and until such various modes of proving the documents are found to be totally acceptable, those are open for doubt. It was urged therefore, on behalf of the respondent that when the respondent himself has produced the suit agreement on record stating that it was signed by said John Daniel, it should be accepted as sufficient compliance to Section 67 of the evidence Act. In this connection the dicta of the Apex Court must be remembered. It is observed in the above said ruling that the receiver of the document, on establishing his acquaintance with the handwriting of the person and competence to identify the writing with which he is familiar, may also prove a document. In my view, the respondent-plaintiff does not pass this test. What is stated by him in the evidence is thus :

> "It is at Exh. PW 1/E I am producing PW 1/F a receipt issued by Mr. John Daniel his signature is at X acknowledging the receipt of Rs. 50,000/- for all goods in the Gourmat restaurant."

If this is the only statement made by the plaintiff, then it could not be said that signature of Daniel was made in his presence nor could it be said that he was acquainted with handwriting of Mr. Daniel and, therefore, become

competent to identify with the writing with which he was familiar. There is not a whisper from plaintiff on record that he was familiar with the handwriting of the said person or he was acquainted with various writings of Mr. Daniel. Therefore, mere production of paper stating that it is signed by Mr. Daniel is in my considered view, no compliance with Section 67 of the Evidence Act and, therefore, the very foundation of the suit of the plaintiff has to collapse for want of proof for valid contract between the plaintiff and said Daniel.

8. It was urged on behalf of the respondent that defendant did not enter into the witness box and, therefore, evidence of the plaintiff should be accepted on record in support of his plea. However, it is needless to mention that the plaintiff has come with the specific case on the basis of suit agreement between himself and Daniel and, therefore, it was for the plaintiff to prove his case and non-examination of defendant in the Court would be of no consequence, especially when defendant was not called upon to prove any other aspect but vested his defence only by cross-examining the plainitff's witnesses and, therefore, no adverse inference could be drawn against the defendant only because he did not enter the witness box.

9. Both the parties sought to make several submissions with regard to various evidential aspects involved in this matter. However, as noted above, very foundation of the plaintiff's case is found to be shaky and, therefore, we need not advert ourselves to any other aspect involved in the dispute. In the result, I am unable to agree with the finding recorded by the learned trial Judge and hold that the plaintiff has failed to prove his case to seek redress to obtain either mandatory or perpetual injunction in the suit. In the result, appeal is hereby allowed. Judgment and order of Civil Judge, Senior Division, Mapusa decreeing the suit is set aside. In view of the facts and circumstances, there will be no order as to costs.

P. V. KAKADE, J.

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